

independently, retain utility for addressing the problems they were meant to surmount.

3. The Single Majority Stockholder Rule is an exception to the Commission's ownership attribution policies and exempts from attribution the non-majority ownership interests of corporate stockholders when a single majority stockholder owns more than 50 percent of the voting stock. The Commission, in crafting this exemption, indicated that the non-majority interests should not be cognizable for purposes of the multiple ownership rules because these interest holders would be unable to direct the affairs or activities of the licensee based on their shareholdings. Notice ¶ 3. This provision was consistent with the Commission's intent to revise and simplify multiple ownership rules that appeared to be unnecessarily restrictive in scope. NAB strongly supports the single majority stockholder exception as a sound, rational policy which should not be changed.

4. The Minority Incentive Provisions, added to the new multiple ownership rules that emerged from the Commission's "seven station" proceeding," were implemented to encourage investment in minority-controlled broadcasting companies. These incentives allowed group owners who would otherwise be subject to the new 12 station limit to own up to 14 stations if at least two of the stations in which they have cognizable interests are minority controlled. Additionally,

the proceeding's 25 percent "audience cap" restriction was increased to 30 percent if any interest exceeding 25 percent were directly attributable to minority controlled stations.

Id. ¶¶ 3-4.

5. There is no inherent conflict between the single majority stockholder exception and the minority incentive provisions. Any potential conflict results from the relative attractiveness of each provision to group owners seeking to acquire non-majority interests in broadcast properties. See id. ¶¶ 5-8. Therefore, reconciling any potential conflict lies in making the minority incentive provisions more attractive than they presently are, instead of revising or eliminating the single majority stockholder exception. One possible alternative for the Commission would be to raise the ownership attribution benchmark beyond the present five percent -- ten percent for "passive" investors -- level for group owners investing in minority-controlled stations. Group owners who wish to obtain interests in additional stations without those interests rising to the level of cognizable interests could avail themselves of these higher attribution benchmarks and invest in minority-controlled stations. This approach would address directly the issue of enhancing investment interest in minority-controlled stations yet would not diminish the utility of the single majority stockholder exception. To the extent the raising of the ownership attribution benchmark in these circumstances implicates other Commission rules,

regulations and policies, the Commission could grant waivers on a case-by-case basis.

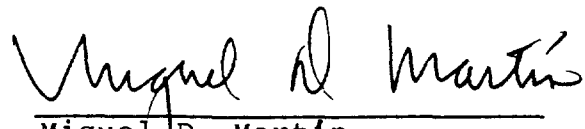
Conclusion

6. NAB supports the retention of the single majority stockholder exception and the enhancement of the minority incentive provisions. Both the single majority stockholder exception and the minority incentive provisions were implemented for laudable purposes, and the individual merit of each is not reduced by any potential conflict in their operations. Instead of enhancing the attractiveness of the minority incentive provisions by revising or eliminating the single majority stockholder exception, the Commission should seek to make the minority incentive provisions more expansive and more attractive than they are presently.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
BROADCASTERS  
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Washington, D.C. 20036

  
Henry L. Baumann

  
Miguel D. Martin  
Counsel

August 7, 1985

EXHIBIT 6

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC  
Office of the Secretary

In the Matter of )

Radio and Television Broadcasting: )  
Reexamination of the Single )  
Majority Stockholder and Minority )  
Incentive Provisions. 47 C.F.R. )  
Part 73. )

MM Docket No. 85-192

COMMENTS OF THE  
AMERICAN LEGAL FOUNDATION

I. INTRODUCTION

The American Legal Foundation ("ALF" or "Foundation") submits these comments on the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("Notice") to examine the interaction between the "single majority stockholder" exception and the recently adopted "minority incentive" component of the national broadcast multiple ownership rule. See 50 Fed. Reg. 129, 27629 (1985). Specifically, the Commission is considering whether or not a conflict exists in the simultaneous application of these two policies, and if so, how this conflict should be resolved. Id.

ALF believes that a conflict between the two provisions does exist and that, inasmuch as the minority incentive provisions were: (1) adopted without adequate support in the record; (2) not supported by any clear expression of Congressional intent; and, (3) violative of the Equal Protection Clause, the Commission should resolve this dilemma by deleting the minority incentive provisions from its regulations. Such an action would enable the single majority stockholder exception to serve as a

stimulus for investment in broadcasting corporations by minority, as well as non-minority investors. Deletion of the minority incentive provisions is therefore in the public interest.

## II. INTERESTS OF THE AMERICAN LEGAL FOUNDATION

The American Legal Foundation is a non-profit, public interest law center organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in media-related matters. ALF was founded in 1980, and currently represents the interests of over 40,000 supporters nationwide.

ALF has participated in numerous deregulatory proceedings before the FCC in efforts designed to promote a free market economy and eliminate burdensome governmental regulation of the broadcasting industry. See ALF Comments in In the Matter of Elimination of Unnecessary Broadcast Regulations, MM Docket No. 83-842, and In the Matter of Amendment of Part 25 of the Commission's Rules and Regulations, MM Docket No. 84-360.

Of more relevance to the instant proceeding, ALF participated in the multiple ownership rulemaking which ultimately led to the adoption of the Commission's minority incentive provisions. In the Matter of Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Gen. Docket No. 83-1009. In that proceeding, ALF filed a petition for reconsideration (still pending before the Commission), in which we argued that race-based, minority incentive provisions do not comport with Congressional intent regarding the regulation of broadcast licensees and were violative of the Equal Protection Clause.

Through this and other such administrative proceedings, ALF has demonstrated its continuing interest in ensuring that broadcasters serve the public interest while remaining free from unwarranted, counter-

productive, and, at times, unconstitutional regulations proposed by the Commission.

### III. COMMENTS OF THE AMERICAN LEGAL FOUNDATION

The FCC has noted on several occasions that the primary purpose for determining ownership attribution levels and seeking compliance with its multiple ownership rules is that "a democratic society cannot function without the clash of divergent views." Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1079 (1974), recon. denied 53 FCC 2d 589 (1975), remanded on other grounds, National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), aff'd. 439 U.S. 775 (1978). See also Report and Order in Docket 83-46, 97 FCC 2d 997, 1004 (1985).

By placing restrictions on the number of broadcast stations any one person can own or control, the Commission has rationally attempted to foster and promote a greater diversity of competing viewpoints. "The significance of ownership. . .lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." Report and Order in Docket 83-46, 1004, supra, quoting from Second Report and Order in Docket 18110, supra.

Realizing the importance of diversity and the effect ownership can have on it, the Commission utilizes its attribution policies to determine whether a certain type of ownership interest conveys to the holder an ability to "materially influence or control the business affairs" of licensees. 50 Fed. Red. 129, 27629 (1985). Such an interest is then considered when determining whether a licensee is in compliance with the multiple ownership rules.

In determining the appropriate stockholding level at which to attribute ownership of a corporate licensee's facilities to the individual stockholder, the FCC noted that "relaxation of the benchmark might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities." Report and Order in Docket 83-46, supra, 1002 (emphasis added).

Thus, in crafting its single majority stockholder exception, <sup>1/</sup> the Commission was mindful of the fact that a lower percentage figure for ownership attribution could mean increased opportunities for minorities.

Unfortunately, when the Commission later adopted the minority incentive provisions in its multiple ownership proceeding, it ignored its traditional concern with the evenhanded economic promotion of a diversity of viewpoints, and chose instead to use race-based preference as a possible means of fostering greater minority ownership. While it may be conceded that an increase in minority ownership will have the incidental effect of contributing in some measure to the goal of diversification of control, it can hardly be maintained that the use of racial criteria is necessary to achieve that goal. As Chairman Fowler has noted, it is "diffusion of control -- not diffusion of control to

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<sup>1/</sup> The single majority stockholder exception applies only to corporations in which one person owns more than fifty percent of the voting stock. Where such an ownership interest is involved, the ownership interests of all non-majority stockholders is exempted from attribution. See 50 Fed. Reg. 129, 27629 (1985).



particular group or groups -- which the First Amendment arguably requires." 91 FCC 2d 1260 (1982). Thus, race is largely irrelevant in bringing about diversification of control.

By focusing entirely on the issue of which of the two provisions affords the greater opportunity for minorities, see, e.g., Separate Statement of Commissioner Henry M. Rivera, 50 Fed. Reg. 129, 27632 (1985), the Commission loses sight of the purpose the single majority stockholder exception is intended to serve, namely, diffusion of control.

As the Commission has noted, ". . .these rules will serve to eliminate attribution for most noncontrolling and uninfluential stock interests, by absolving all holdings less than 5% and most of those holdings greater than 5% which are meaningless in terms of influence or control because of the dominance of other shareholders." Report and Order in Docket 83-46, 1008 (emphasis added).

The single majority stockholder exception was meant to enable investors to venture into the broadcasting market as non-majority stockholders without having to be concerned about the number of stations in which an ownership interest was held. The key was control, and the ability to influence programming and hiring practices at a broadcast station. The FCC correctly saw no need to unjustly penalize a non-majority stockholder who could wield absolutely no control over station policy due to the presence of a single majority stockholder.

Commissioner Rivera's defense of the minority incentive provisions, to the point of advocating abolition of the single majority stockholder exception should the two policies be found to serve cross-purposes,

exhibits a disregard for diversification of control. As these comments demonstrate, far from being adopted on "a cursory rationale," the Commission enacted the single majority stockholder exception on the basis of a reasoned decision to advance diversification while stimulating investment. See Separate Statement of Commissioner Henry M. Rivera, supra.

ALF takes issue with Commissioner Rivera's statement that "repeal [of the single majority stockholder exception] would be a small price to pay for preserving the integrity and promise of our new minority ownership initiative." Id. The price to pay would be great were the Commission to abrogate its primary statutory obligation of promoting diversification of control in favor of advancing its own scheme of speculative social engineering.

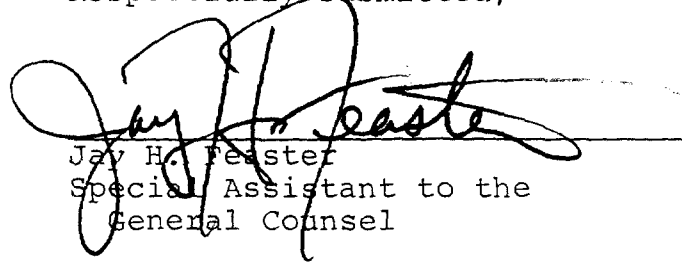
Finally, ALF believes that elimination and repeal of the minority incentive provisions is in the public interest, as they were adopted with inadequate public notice, unsupported by the record established in the proceeding, and in violation of both the Equal Protection Clause and Congressional intent.

The single majority stockholder exception, as currently drafted, meets its primary goal of promoting diversification of control in the broadcasting industry, and has the secondary effect of encouraging investment by minorities and non-minorities alike. No alteration of the exception is currently necessary.

#### IV. CONCLUSION

For all of the foregoing reasons, the American Legal Foundation respectfully requests that the Commission delete its minority incentive provisions, and continue enforcement of its single majority stockholder exception in its present form.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jay H. Feaster", is written over a horizontal line. The signature is stylized with a large, looping initial "J".

Jay H. Feaster  
Special Assistant to the  
General Counsel

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August 7, 1985

EXHIBIT 7

JAN 12 9 08 AM '90

Before the  
Federal Communications Commission  
Washington, D.C. 20554FCC 89-372  
37836

In the Matter of:

Reexamination of the "Single Majority  
Stockholder" and "Minority Incentive"  
Provisions of Section 73.3555 of the  
Commission's Rules and Regulations

MM Docket No. 85-192 ✓

Order

Adopted: December 27, 1989

; Released: January 11, 1990

By the Commission:

1. On June 7, 1985, the Commission adopted a Notice of Proposed Rule Making in the above entitled matter<sup>1</sup> seeking comment on the interaction between the "single majority stockholder" exception to its ownership attribution standards<sup>2</sup> and the "minority incentive" provisions added to its national multiple ownership (or 12-12-12) rules.<sup>3</sup> The Commission instructed the staff to prepare the present Notice at the time it adopted the "minority incentive" provisions to determine whether, and to what extent, the two provisions may operate at cross-purposes and what changes to the provisions might be warranted to remedy any conflict.<sup>4</sup>

2. The American Legal Foundation (ALF) filed a Petition for Reconsideration requesting that the Commission either delete the minority incentive provisions or reopen a rule making proceeding on the provisions.

1 Notice of Proposed Rule Making in MM Docket No. 85-192, FCC 85-303, 50 Fed. Reg. 27,629 (July 5, 1985).

2 See 47 C.F.R. § 73.3555, NOTE 2(b); § 76.501, NOTE 2(b) (1984); and Report and Order in MM Docket No. 83-46, 97 FCC 2d 997, 1008-09 (1984), recon. granted in part, 58 RR 2d 604 (1985), further recon. granted in part, 1 FCC Rcd 802 (1986).

3 See 47 C.F.R. § 73.3555(d); and Memorandum Opinion and Order in Gen. Docket No. 83-1009, 100 FCC 2d 74 (1985), appeal pending sub nom. National Association of Black Owned Broadcasters v. FCC, No. 85-1139 (D.C. Cir. filed March 4, 1985).

4 See Memorandum Opinion and Order, 100 FCC 2d at 95 n. 60.

ALF also appealed the Commission's order adopting the minority incentive provisions in the U.S. Court of Appeals for the D.C. Circuit.<sup>5</sup> That appeal is being held in abeyance pending Commission action on the ALF Petition. The Commission has not yet acted on the Petition because it raises issues regarding the constitutionality of the minority incentive provisions which are very similar to issues currently under litigation in Winter Park Communications, Inc. v. FCC, 863 F.2d 347, reh'g denied, Nos. 85-1755 and 85-1756 (D.C. Cir. June 21, 1989), petition for cert. filed sub nom. Metro Broadcasting, Inc. v. FCC, No. 89-453 (Sept. 18, 1989). The Commission believes that until it is able to finalize its order adopting the minority incentive provisions, it is premature to examine the interaction between the provisions and the single majority stockholder exception in this proceeding.

3. Moreover, in view of the significant amount of time that has elapsed since the initiation of this proceeding, we believe that it would not serve the public interest to attempt to resolve this proceeding based on the existing record. Therefore, we have determined that it should be dismissed without prejudice.

4. Accordingly, IT IS ORDERED that MM Docket No. 85-192 IS TERMINATED without prejudice.

5. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

*Donna R. Searcy*

Donna R. Searcy  
Secretary

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<sup>5</sup> See National Association of Black Owned Broadcasters v. FCC, No. 85-1139 (D.C. Cir. filed March 4, 1985).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing OPPOSITION OF  
GLENDALE BROADCASTING COMPANY TO MOTION TO VACATE RECORD, ETC.  
are being served this 25th day of October 1996 on the following:

By first class United States mail, postage prepaid:

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\_\_\_\_\_  
Gene A. Bechtel